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IS A LAUNDRY ENGAGED IN MANUFACTURING WITHIN THE MEANING OF THE BANKRUPT ACT?

To define the term "manufacturing" would seem to be a simple matter, and yet in determining when a person or company is engaged in manufacturing within the meaning of the bankrupt act, there have been frequent controversies between litigants, the most recent of which is recorded in the case of *In re* Troy Steam Laundering Co. (U. S. D. C., N. D. N. Y.), 132 Fed. Rep. 266, where the court held that a corporation conducting a laundry, the largest part of its business being the washing, starching, ironing and polishing of collars, cuffs, etc., for manufacturers, before they are put on the market, is engaged principally in manufacturing, and is subject to proceedings in involuntary bankruptcy. The court gave expression to its views on this question, as follows:

"It appears that in its articles of incorporation, filed July 20, 1892, the object of the corporation is declared to be 'to carry on the laundry business in all its branches; the nature of such business is laundering or washing and ironing clothing, cloths, linens and other articles.' March 2, 1901, for the purpose of extending the business and powers of said corporation, an amended certificate was filed, in which it was declared, among other things, 'that the extension of business powers and rights proposed is the inclusion of the right to purchase, manufacture, and sell shirts, drawers, collars, cuffs, shirtwaits, neckwear, and other garments for men, women, and children.' It appears that the principal business in which the alleged bankrupt was engaged was the laundering — that is, the washing, ironing, and polishing — of collars, cuffs, etc., for the manufacturers of those articles, prior to their being put upon the market. The alleged bankrupt has over $100,000 invested in its plant, machinery, etc., and has done a very large business. It has also done some custom work in laundering. In carrying on its business the company has purchased for use therein, and has used, large quantities of soap, etc., bluing, starch, etc. These articles are not purchased for resale, or to be worked over into other forms or articles for sale, but simply for use in cleansing, coloring, and giving form and polish to collars, cuffs, etc.; that is, in putting on them the finishing touches for market. This company was not engaged in mercantile pursuits or business. Was it engaged principally in manufacturing? This court thinks it was. To come within the provisions of the bankruptcy law as a manufacturer, it is not necessary that the corporation itself perform every operation with or upon the so-called raw material necessary to produce the completed article. It is all-sufficient if it do any one of the several acts necessary to produce such manufactured article in its completed form. Should a corporation be engaged principally in polishing hoes, hammers, or other farming or mechanical tools for those who make such tools for use or sale, it would be as much engaged in manufacture as those who take the prior steps in forming and shaping the iron and wood into the articles named. The doing of anything necessary to produce the completed article of manufacture is manufacturing. It appears that the completed collar and cuff, etc., are usually washed, starched, and ironed as a part of the process of manufacture. Who will deny that the one who polishes hammers in a hammer factory, or for the manufacturer of hammers, prior to such articles being put on the market, is engaged in manufacturing? The grinding and polishing department may be one by itself, and the fact that this final touch is called 'polishing' does not take it out of the realm of manufacturing. Neither does the fact that the process of starching and ironing, etc. (polishing), collar, cuffs, etc., is called 'laundering,' take that work out of the field of manufacturing. It is a part of manufacture, by whatever name called, when done in connection with and as a part of the finished manufacture of the article. Of course, all laundering is not manufacturing, nor is all polishing manufacturing. He who polishes a rusty edge tool that has been in use is not engaged in manufacturing, nor is the laundryman who merely washes, starches, and irons clothing, etc., worn and in use, engaged in manufacturing. The court does not hold

that all laundering is manufacturing, or that all laundrymen are manufacturers, but that, when laundering is done as a necessary or essential part of manufacturing, the firm, individual, or corporation who does such laundering is engaged in manufacturing within the intent and meaning of the bankruptcy act. A corporation might be formed for the purpose of doing a manufacturing business, and it might confine its work to the mere cutting of linen into shape for sewing so as to form collars, cuffs, etc. The corporation completes nothing—produces no manufactured article—still it is engaged in manufacturing, and nothing else."

It would seem on first consideration that this decision was opposed to the rule laid down in the case of *In re* White Star Laundry Co., 117 Fed. Rep. 570, 9 Am. B. Rep. 30. In this latter case, however, it appeared that the company was engaged simply in the washing, starching and ironing of clothing in use by the wearers thereof, not in putting the finishing touches on manufactured clothing.

NOTES OF IMPORTANT DECISIONS.

TELEGRAPHS—USE OF MAILS BY TELEGRAPH COMPANY TO DELIVER MESSAGE OUTSIDE OF DELIVERY LIMITS.—A recent case of great interest to telegraph companies is that of Gainey v. Western Union Telegraph Co., 48 S. E. Rep. 653, where the Supreme Court of North Carolina held that where a death message was sent to plaintiff directed G "P. O., Idaho, Fayetteville, N. C.," and asked plaintiff to "write" if he could not come, the telegraph company was not guilty of negligence, on receiving the telegram at Fayetteville, in placing it in the post office for further delivery to plaintiff, instead of delivering the message to plaintiff in Idaho, which was neither a telegraph station nor within the delivery limits of Fayetteville. The court in the course of an interesting opinion said:

"It is undoubtedly true, as argued by the learned counsel for the plaintiff, that a telegraph company is not exempt from liability merely because the person addressed may chance to live outside its free delivery limits, because it undertakes expressly, and by the very terms of its contract, to make a delivery within those limits free of any charge, and, impliedly, at least, to deliver beyond the fixed limits, for which latter service, an extra charge is made, not exceeding in amount the actual cost of such special delivery. We have held that when a message is received at a terminal office to which it has been transmitted for delivery to the person addressed it is the duty of the company to make diligent search to find him, and, if he cannot be found, to wire back to the office from which the message came for a better address; and likewise it is the duty of the company, when it has discovered that the person for whom the message is intended lives beyond its free-delivery limits, either to deliver it by a special messenger, or to wire back and demand payment, or a guaranty of payment, as it may choose to do, of the charge for the special delivery; and, if it fails to deliver without demanding and being refused payment of the charge, it will be liable for its default. It is not liable, though, if the sender of the message, when proper demand is made, refuses to pay the extra charge for a special delivery beyond the limits established for free delivery by the company, provided those limits are reasonable. Hendricks v. Telegraph Co., 126 N. Car. 310, 35 S. E. Rep. 543, 78 Am. St. Rep. 658; Bryan v. Telegraph Co., 133 N. Car. 603, 45 S. E. Rep. 938; Telegraph Co. v. Moore, 12 Ind. App. 136, 39 N. E. Rep. 874, 54 Am. St. Rep. 515. To what extent this doctrine should be carried, or how far beyond the free-delivery limits the company should be required, in any given case, to make a special delivery, we need not now consider, as the question is not presented in this particular appeal. Our case must be decided upon its own peculiar facts, and we can derive little or no aid, except by analogy, from the decisions. The message which was sent to the plaintiff clearly indicated that Fayetteville was the terminal office on the line of defendant to which the message was to be sent, and that the message, when transmitted from Live Oak and received at that office, would have to be transmitted to the mails for delivery to the plaintiff. If this is not true, why was there a double address, one to Fayetteville and one to Idaho? There is another significant fact in the case. The message was not only addressed to Fayetteville as the farthest reach of the telegraph service, but Idaho was indicated; not as a place merely of the plaintiff's residence in the vicinity of Fayetteville, but as his post office, or the place where he received his mail. If the parties intended that the message should be sent to Fayetteville, and then given to a special messenger, and carried to the sendee at Idaho, why not use the simple word 'Idaho,' without the prefix 'P. O.'? But if it was their purpose that the message should go to Fayetteville by wire, and then a written copy be mailed to the sendee at Idaho, it would be perfectly natural to use the prefix, and we can readily understand in such a case why it should have been done."

ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY TO REPRESENT CLIENT AFTER FINAL JUDGMENT.—It is undoubtedly the ancient rule that an attorney's authority ends with judgment in the trial court, and yet in the general practice of the law the rule is seldom observed. And even the courts have begun to recognize the attorney's

right to represent his client after judgment even without special authorization, of which fact the recent case of Brown v. Arnold (C. C. A.) 131 Fed. Rep. 723, is a conspicuous example. In that case the point held that the retainer of an attorney at law to conduct an action confers upon him authority to stipulate with opposing counsel after the rendition of judgment in favor of his client, and after the expiration of the term of court, but within the time for procuring a writ of error, that the case shall abide the final decision of another action which involves the same question, and is conducted by the same attorneys. In this case the same attorneys represented 37 defendants, including the defendant in this case. Judgment for the defendants had been secured in every case. The plaintiff proceeded to appeal all the cases, but the attorneys for the defendant offered to sign a stipulation that the plaintiff should sue out a writ of error from only one of the judgments obtained and that all the other cases against the other defendants should abide the result of the final decision in that case. The stipulation was signed and agreed to. The plaintiff took only one writ of error. On appeal in that case the judgment was reversed. The proceeding in the principal case is to enforce specific performance of the stipulation, the validity of which stipulation is contested by the defendant on the ground that he had given his attorneys no authority to represent him after final judgment. The opinion of the court on the powers of an attorney after final judgment are interesting. The court said:

"It is said that the attorneys for Arnold were without authority to make the stipulation, because judgment had been rendered in his favor, and the term of court at which it was entered had expired; that when the judgment was recorded and the term closed the power of Arnold's attorneys to work for him, derived from their original retainer, ceased, and a new warrant of attorney was indispensable to their authority to sign the stipulation. There are two answers to this contention. In the first place, if a new warrant of attorney was requisite after the judgment was rendered, the legal presumption is that the attorneys had obtained it. The bill contains an averment that they agreed to and signed the stipulation as the solicitor and counsel of Arnold. The presumption is that they did not represent themselves to be that which they were not. The stipulation was within the scope of the general power of attorneys who are conducting several cases of a single class which involve the same issue. Stone v. Bank of Commerce, 174 U. S. 412, 422, 19 Sup. Ct. Rep. 747, 43 L. Ed. 1028; Scarritt Furniture Co. v. Moser, 48 Mo. App. 543, 548; Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. Rep. 277; Eidam v. Finnegan, 48 Minn. 53, 50 N. W. Rep. 933, 16 L. R. A. 507. They were officers of the court. Their signatures to the stipulation constituted *prima facie* evidence of their authority to execute it, The assumption by an attorney at law of authority within the scope of the general power of a practicing lawyer to act for a party to an action or suit is always presumptive proof of his actual authority to do so. The authority assumed by an attorney at law to act for a party in court is valid until disproved, not void until proved. The burden was upon the defendant to establish by answer and evidence that his attorneys were without the authority which they assumed. In the second place, while the general rule is said to be that the authority derived by an attorney at law from a general retainer to conduct a litigation on behalf of his client ceases when the judgment is rendered, there are many exceptions to this rule, and in the actual practice of the law it is at least doubtful whether it is not more honored in the breach than in the observance. Among the acknowledged exceptions to it are the authority of the attorney for the party who prevails in the judgment to collect it, his authority to receipt for its proceeds and to discharge it, his authority to admit service of a citation issued upon a writ of error or appeal to review it, and his authority to oppose any steps that may be taken within a reasonable time by the defeated party to reverse it. Berthold v. Fox, 21 Minn. 51, 53; Grames v. Hawley (C. C.), 50 Fed. Rep. 319, 321; Lusk v. Hastings, 1 Hill, 659, 662; Graves v. Graham, (City Ct. N. Y.) 43 N. Y. Supp. 508; Beach v. Beach (S. Dak.), 43 N. W. Rep. 701; Barfield v. McCombs (Ga.), 15 S. E. Rep. 666. The case at bar falls fairly within the exceptions. Arnold was the prevailing party in the judgment in the action against him. He secured a judgment against the receiver for his costs. Thereupon his attorneys had authority, by virtue of their general retainer, to collect the amount of this judgment, to accept service of a citation upon the issuance of a writ of error to review it, and to take any requisite steps to oppose the attempt of the defeated party, made within a reasonable time after the entry of the judgment, to reverse it. The attorneys of Arnold were also the attorneys of about 36 other defendants who had secured similar judgments. The receiver was about to apply for writs of error to reverse them. The 37 cases involved a single question. In order to prevent the reversal of the judgments, the attorneys for these 37 parties agreed with the attorney for the receiver that he should select one case and sue out but a single writ of error, and that all the cases should abide the final decision of that in which the writ was to be issued. The receiver relied upon the agreement, and performed it. The attorneys for the defendant followed the test case through the Court of Appeals (106 Fed. Rep. 438, 45 C. C. A. 408) and the Supreme Court (23 Sup. Ct. Rep. 845, 47 L. Ed. 344), until the reversal of the judgment therein was finally affirmed. All the rights and interests of the defendant, Arnold, were completely protected by this course of proceeding. The question in his case was argued in the higher courts by the attorneys whom he had retained to try it for him

in the court below, by the attorneys who had authority to accept, and who undoubtedly would have accepted, service of citation in error, and who would have argued his case in the higher courts if they had not made the stipulation and a writ of error had been issued, as it certainly would have been, to review it. Their stipulation prvented the issue of that writ, protected all the rights of their client, saved him the unnecessary expenditure of money, and was as completely within the authority granted to them by their retainer as the acceptance of service of a citation or the resistance of a motion for a new trial. Our conclusion is that the retainer of an attorney at law to conduct an action confers upon him authority to stipulate with opposing counsel after the rendition of a judgment in favor of his client and after the close of the term of court at which it was rendered, but within the time for procuring a writ of error, that the case shall abide the final decision of another action which involves the same question and is conducted by the same attorneys."

FEDERAL COURTS—REMOVAL OF CAUSE IN SUIT BY STOCKHOLDER AGAINST THIRD PARTIES AS AFFECTED BY DOMICILE OF CORPORATION.—The removal of causes from state to federal courts has frequently given rise to questions of considerable difficulty. One question of interest which has received the attention of the federal courts is that taken for the subject of this editorial which was discussed in the recent case of Groel v. United Electric Co. (U. S. C. C., D. N. J.), 132 Fed. Rep. 252, where the court held that in a suit in equity instituted by a stockholder in his own name, but upon a right of action in his corporation, such corporation is an indispensable party, and, for the purpose of determining the juristiction of a federal court, will be aligned with the defendants whenever the officers or persons controlling it are shown to be opposed to the object sought by the complaining stockholder, and when such opposition does not appear it will be aligned with the complainant.

The court said: "The New Jersey company, in the case now under consideration, cannot be considered a merely formal or nominal party. It is a necessary and indispensable party. The case could not proceed without it. The complainant seeks relief in its behalf because it will not seek it for itself. As it will not voluntarily act as complainant, the practice in equity requires that it shall be brought in as a party defendant. It follows that, in determining the question of jurisdiction, its citizenship cannot be ignored. But the mere fact that it stands as a defendant on the face of the pleadings does not fix its *status* in the controversy. That is fixed by its real relation to the controversy. Whether that relation requires it to be ranged with the complainant or with the Pennsylvania company as a party defendant, is the question presented in this case."

The court cites and discusses a large number of cases including Hawes v. Oakland, 104 U. S. 450; Arapahoe County v. Railway Co., Fed. Cas. No. 502; Greenwood v. Freight Co., 105 U. S. 13; New Jersey, etc., Co. v. Mills, 113 U. S. 249; East Tennessee, etc., Co. v. Grayson, 119 U. S. 240.

The court criticises the cases of Hutton v. Bancroft & Sons Co. (C. C.), 77 Fed. Rep. 481 and Deneufville v. Railway Co., 81 Fed. Rep. 10 as follows:

"In Hutton v. Bancroft & Sons Co. (C. C.), 77 Fed. Rep. 481, the complainant, a citizen of Delaware and a stockholder in the Bancroft & Sons Company, a corporation of Delaware, filed his bill in the Delaware Court of Chancery against that company and one Bloede, a citizen of Maryland. The suit was removed to the United States Circuit Court on the petition of Bloede. A motion to remand was denied. By the bill of the complainant it was alleged that, by reason of certain representations by Bloede, the company had been induced to enter into an agreement with Bloede whereby the company was to exchange some of its stock for stock of the Victor G. Bloede Company; that the stockholders of the Bancroft & Sons Company, in the absence of the complainant, had ratified the agreement; that the agreement was made without lawful authority; that Bloede had received large dividends on stock of Bancroft & Sons Company acquired by him under the agreement, and that other dividends had been declared in his favor; that the representations by Bloede to the company were false, and known by him to be so; and that the company would not have entered into the agreement if it had known the truth concerning the representations. The prayer was that Bloede might be required to repay the dividends by him received, to surrender his stock for cancellation, and that the company be restrained from paying to him any further dividends, etc. The company's separate answer admitted that it was induced to make the agreement by reason of Bloede's false representations, and that upon the discovery of the truth as to the representations it endeavored to secure a return of the stock by Bloede to the company. It also admitted all the other allegations of the bill except the one charging it with having exceeded its lawful authority in making the agreement, which it neither admitted nor denied, but submitted to the judgment of the court. With these facts before the circuit court, it was said:

'There appears to be no matter of dispute, or any controversy whatever, between the complainant and the defendant, the Joseph Bancroft & Sons Company. On the contrary, it is apparent that their interests in the outcome of the present suit are really the same, and that they are both seeking the same objects, to-wit: the return and cancellation of the stock of the Bancroft & Sons Company which has been issued to Bloede, the repayment of the money paid to him for dividends thereon, and an injunction to pre-

vent the payment of any further dividends on that stock. So complete is the identity of interest between the complainant and the Bancroft & Sons Company, there cannot be the slightest doubt that a decree sustaining the bill in every particular would be equally satisfactory to both. In fact, they are, for the purposes of the present suit, joint complainants. There is but one exception, already noted, in the answer of the Bancroft & Sons Company to its uniform admissions of the charges in the bill, and that is in reference to the alleged unauthorized act of the Bancroft & Sons Company in the purchase of the stock of the Victor G. Bloede Company. To this charge, however, the answer makes no denial, and submits the question to the judgment of the court. There is, therefore, no matter of dispute between Hutton and the Bancroft Company.'

The denial of the motion to remand was evidently because the complainant's company was aligned with the complainant and not the defendant, and consequently that the suit was, in reality, one between citizens of Delaware and a citizen of Maryland. Such alignment was entirely proper. It is difficult, however, to harmonize the case with the doctrine of Hawes v. Oakland. It does not appear that the complainant made any effort, before filing his bill, to get the company itself to commence a suit. It is true the case was commenced in a court of the state of Delaware. It is also true that the courts of that state may not have adopted so rigid a rule concerning the essential allegations in a stockholder's bill as that declared in Hawes v. Oakland. But no such consideration can affect the administration of justice in a federal court. Though a stockholder's bill filed in a state court may not, by any rule of that court or any law of the state, be required to be verified by oath, and though, in a case removed from a state court to a federal court, the provision of the ninety-fourth equity rule concerning such verification is not applicable, the bill, though removed from a state court, must contain the essential allegations required by Hawes v. Oakland, otherwise it will be demurrable just as a bill failing to contain such allegations filed originally in a federal court is demurrable. This point, however, does not seem to have been presented in Hutton v. Bancroft & Sons Co., nor was it considered in the opinion. The opinion, therefore, cannot be deemed as one supporting the doctrine that in all cases where a stockholder and his company are citizens of the same state, and the stockholder files a bill against his company and citizens of other states for relief to which his company is entitled, his company shall be aligned with the complainant. It supports only the doctrine that, on a stockholder's bill for the redress of grievances suffered by his corporation, the corporation, if there be no real controversy between it and the stockholder, will, though it be a party defendant in the suit, be aligned with the stockholder as a party complainant in the controversy.

In De Neufville v. New York & Northern Ry. Co., 81 Fed. Rep. 10, 26 C. C. A. 306, we have a decision by the Circuit Court of Appeals of the Second Circuit. In this case the bill was filed by a stockholder, who was not a citizen of the state of New York, against his own corporation and another corporation, both citizens of New York. A demurrer to the bill for want of equity was sustained by the circuit court. The Circuit Court of Appeals reversed the circuit court, holding the bill to be good, and it the course of the opinion used this language:

'The real controversy is between the corporation, whose officers refuse to assert its rights, and the alleged conspirators, who have deprived it of its property. If the wholesome rule approved by the supreme court in numerous decisions were followed, and the parties arranged, not as they stand in title, but according to their interest in the controversy, we would have the New York & Northern Railway Company (the stockholder's company) classified as a plaintiff, and the diversity of citizenship necessary to confer jurisdiction would no longer exist. If the circuit courts were entirely free to enforce the provisions of the fifth section of the act of 1875 to every case where it logically applies, they would, no doubt, be able to relieve their dockets, as was suggested in Hawes v. Oakland, of many cases which have no proper place there; but the decisions in Dodge v. Woolsey, Hawes v. Oakland, and Quincy v. Steel, and the ninety-fourth rule in equity, seem to preclude a strict application, in cases such as the one at bar, of the rule that parties may be rearranged according to interest in the controversy.'

With profoundest respect for the opinions of this high court, I must withhold my assent to the statements above quoted. Evidently, the Circuit Court of Appeals refused to align the complainant's company with the complainant because they supposed the cases cited and the ninety-fourth equity rule had modified the "wholesome rule approved by the supreme court in numerous decisions" concerning the arranging of parties according to their interest in the controversy. I have already endeavored to show that no such modification has been made. It may be well, however, to refer again to the cases cited by the Circuit Court of Appeals. Dodge v. Woolsey was decided in 1855, when, under the law as it then stood, the parties were classified according to their places in the pleadings. Ever since the construction of the act of 1875 by the supreme court in the opinions rendered in the Removal Cases and in Barney v. Latham, the parties have been classified by that court, no taccording to their real interest in the controversy, as stated in the De Neufville Case, but according to the facts of the case. In the Removal Cases the court said:

'Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts.'

And in Barney v. Latham, in referring to the Removal Cases, the court said:

'Disregarding as immaterial the mere form of the pleadings, and placing the parties on opposite sides of the real matter in dispute according to the facts, we found that the only controversy there was between citizens of Ohio and Pennsylvania on one side, and certain corporations created under the laws of Iowa on the other.'

Hawes v. Oakland and Quincy v. Steel, as above stated, were collusive suits, and dismissed for that reason, without consideration of the question of the proper alignment of the parties therein.

In the De Neufville Case the complainant averred in his bill that the defendants had obtained control of a majority of the stock and bonds of his company for the purpose of wrecking it; that they had procured, by resignation and election, a board of directors of the complainant's company in harmony with that purpose; and that the board so elected did in fact, by refusing profitable business and diverting traffic, accomplish such purpose. In such a case the classification of the parties 'according to the facts' would put the complainant on one side of the controversy and his own corporation on the other; for, as a corporation can act only through its authorized agents, the position assumed in a controversy by such agents, must necessarily fix the position of the corporation. Had this principle been adopted by the Circuit Court of Appeals, it would not have changed their judgment in the case, but that judgment would then, as I think, have been founded on reasons approved and adopted by the supreme court in the three cases of Greenwood v. Freight Co., New Jersey Central Railroad Co. v. Mills, and East Tennessee, etc., Railroad v. Grayson."

THE TERM "POLICE POWER."

In view of the popular agitation at the present time to extend legislative control over "trusts" and monopolies by virtue of the so-called "police power," it is, perhaps, pardonable to inquire, what the "police power" of a state actually embraces. The writer is perfectly well aware of the fact that the attempt to answer such an inquiry would be regarded by most lawyers as exceedingly foolhardy. The writer would indeed display an adventurous spirit who would attempt to discuss within the narrow confines of a magazine article, any of the numerous vital and intricate legal problems which are usually treated under the head of "police power." These problems are vital because the police power, however one may define it, has had its origin in the idea of self-defense as possessed by the state as a whole; and they are intricate, because this power of the states, at one time or other, has been forced to meet and wage battle with many of the most important powers delegated to the federal government. It is beyond the scope of this article to discuss the intricacies of these qeestions. Much of the confusion has arisen from a failure, on the part of the judges and text-writers, to unite upon any one conception of what the police power actually is. It has received almost as many definitions as there have been persons to define it. Consequently it is not surprising that many of their statements seem contradictory and confusing. The object of this paper is not to solve difficulties, but to attempt to show that the difficulties really lie beyond the limits of an accurate definition of the "police power." The plan will be to take up briefly: first, the origin and history of the term, which will explain some of the confusion in its use; then, to collect some of the leading definitions; and, finally, to form a definition of our own.

"Police power" as a recognized legal term is a little more than a quarter of a century old. The fourteenth edition of Bouvier, published in 1871, did not contain it. It first appeared in that work in the fifteenth edition, in 1883. The Law Dictionary of Rapalje and Lawrence, published in 1883, did not include "police power." The term first appeared in the United States Digests in 1879. Blackstone[1] seems to have been the first writer upon English law to give any prominence to the word "police." In treating of crimes the learned author attempts to classify certain general offenses against the government. He divides them into four classes: (1) offenses against public justice; (2) offenses against public peace; (3) offenses against public health; (4) offenses against public police or economy. The last are defined as offenses against the "due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations." Many courts and writ-

[1] Book IV. p. *162.

ers have attempted to find in this a definition of the modern phrase "police power." But these very courts or writers would never think of including under the term many of the special offenses mentioned thereunder by Blackstone, and certainly would never exclude therefrom offenses against public health. The truth seems to be that the learned author was not using the word "police" advisedly. Whenever he subsequently mentions this class of offenses, he uses the word "economy" without coupling thereto the word "police." At the time of the adoption of the federal constitution such terms as "laws of police," "regulations of police," etc., had long been in existence, and were defined as "those laws and rules established for the civil enforcement of peace and order, and the promotion of health, and the security of life and property." In the Revised Statutes of New York of 1829, there is a division of the laws headed "Internal Police of the State," and the division follows the lines indicated by the definition just given. The same is true of the statutes of Massachusetts and of other states at that time. The phrase "internal police of the state" was frequently used by the judges of the supreme court, during the first thirty or forty years of the history of that court, and there can be no doubt that the phrase referred directly to the division made in the state statutes of that period.

The term "police power" appears to have been introduced into our law for the first time by Chief Justice Marshall in the case of Brown v. Maryland,[2] decided in 1827. The only word that was new in that connection was the word "power," and its use seems quite natural, when it is remembered that the extent of the prerogatives of the federal and state governments were at that time generally known in terms of "powers," and were measured by the extent of the subjects over which those powers reached.

If we examine the circumstances surrounding th · advent of this troublesome phrase, it will be seen that Marshall used it as synonymous with "internal police," or those laws directed at "public safety, health and morals." The question before the supreme court in Brown v. Maryland was as to the constitutionality of a statute of Maryland, which required importers of certain goods to pay a license tax. Taney was then at the bar, and argued for the constitutionality of the law. He appealed to the court as follows:

"If congress may give the right to sell in any manner, they may also give the right to sell in any place; and the police laws of the different states, made for their safety or health,[3] exist only by permission of congress."

He argued that gunpowder might be sold in the heart of Baltimore. In the opinion of the court, which he delivered, Marshall answered Taney's argument in the following words:

"The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the states. * * * The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power and forms an express exception to the prohibition we are considering."

There can be no possible doubt that Marshall was using the term "police" in the limited sense which it had always borne up to that time. Whatever extended meaning may have been subsequently given to "police power," does not carry with it the weight of the great chief justice's name. This is further evidenced by the fact that the phrase as used by Marshall passed unnoticed. Although there were during the next ten years many cases before the supreme court in which the term would naturally occur, it is not met with again until after the death, of Marshall, in the case of New York v. Miln,[4] decided in 1837. The legislature of New York had passed a law requiring the master of every incoming vessel to furnish a statement of the race, name, age, occupation, etc., of every passenger. The supreme court held that the act was not a restriction upon "commerce or navigation," and, even if so, that it was within the general power of a state over its "internal police." In this connection, Justices Barbour and Thompson, in their opinions, quote the passage given above from the opinion of Marshall in Brown v. Maryland. Justice Thompson states:

"Can anything fall more directly within the police power and internal regulation of

[2] 12 Wheat. 419.

[3] The italics are the writer's.

[4] 11 Pet. 102.

a state than that which concerns the care and management of paupers and convicts."

The term is not yet extended beyond its legitimate scope. It is not used again by the supreme court until the case of Prigg v. Pennsylvania,[5] in 1842. Taney, who had now gone upon the bench, delivering the opinion of the court, uses this language:

"And it could hardly be maintained that the arrest and confinement of the fugitive in a public prison under such circumstances, until he could be delivered to his owner, was necessary for the internal peace of the state, and therefore a justifiable exercise of the powers of police."

Justice Daniel states that the police power of a state "is confined to matters strictly belonging to her internal order and quiet." While the term is still carefully limited, it is noticeable that the phrase, by this time, had become perfectly familiar to the judges, lawyers and reporter. The reason is not far to find.

In 1830 the abolition controversy was launched. The proposed annexation of Texas, the slave rising at South Hampton, the preaching of "State Sovereignty" by Calhoun, and the controversy over the South Carolina exclusion laws, had drawn the attention of the country to the case of New York v. Miln, where the restrictions against ship-masters had been upheld. In 1835 Preisdent Jackson in his annual message to congress had recommended that abolition literature be excluded from the mails by act of congress, and the senate under the leadership of Calhoun had reported that congress had no such authority. The term "police power" became at once familiar over the entire country. It was found in the columns of every newspaper and was in the mouth of almost every public speaker. The frequency of its use may be gathered from an examination of the proceedings in congress about the time of the decision of Prigg v. Pennsylvania. As soon as the term became popular, its meaning became extended. As Mr. Hastings[6] has pointed out, the "residuary sovereignty" of Madison had never, "taken," and is hard to find outside of the Federalist. The qualifying adjective did not suit those who advocated the supremacy of the state. The term, "state sovereignty" was distasteful to those who feared the separatistic tendency in the states. The politicians on both sides seem to have seized upon the expression "police power" to express the "bone of contention." The courts responded only too quickly to this popular misuse of the phrase. From this time on it was used by the judges to express almost every conceivable idea of state power. It will be sufficient to give one illustration of this influence upon the legal use of the phrase. Justice Taney, who had limited the term so strictly in Prigg v. Pennsylvania, exclaims only four years later in the license cases:[7]

"But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominions."

It would be impossible to follow any further the history of the phrase. From now on it is thrown around in almost every conceivable fashion. It is possible, however, out of the confusion to select a few definitions that have had influence, either from the prestige of the source from which they sprang, or from the number of times they have been cited. A definition which has been quoted probably oftener than any other, is the expression of Judge Shaw, in the case of Commonwealth v. Alger:[8]

"The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and source of this power, than to mark its boundaries, or prescribe limits to its exercise."

[5] 16 Pet. 539.

[6] Proceedings of the American Philosophical Society, Sept. 1900.

[7] 5 How. 504.

[8] 7 Cush. 53, 84.

Manifestly this is nothing more or less than "residuary sovereignty." Well may Justice Shaw declare it difficult to prescribe limits to the exercise of such a power. Further than human reason and the constitution, there are no limits. As a description of any definite branch of constitutional law, to which certain definite principles are attached, the words of the learned judge are meaningless. Few definitions, however, have had so much influence as this one, delivered as it was from a bench of high prestige and by one of the ablest judges who ever sat upon it.

Next in weight must be placed the definition of Judge Cooley. He states, "that the police power of a state embraces its whole system of internal regulations, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but, also, to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the enjoyments of rights by others."[9] This definition is slightly more limited than that of Justice Shaw. For instance, the language would exclude, among others, those laws which have for their object the actual administration of a state government, its bureaus, its charities, etc. Judge Cooley's definition regards the police power from the standpoint of the individual. The exercise of "police power," in its true sense, is not aimed at the protection of the rights of individual citizens, save as this protection is necessary for the safeguarding of the existence of the state. Writers, who attempt to give to the "police power" such a broad meaning, and still to treat it as a special division of constitutional law, are necessarily forced into many contradictions. This may be demonstrated by a few quotations from Judge Cooley's own work. On page 710, the author declares that all rights and contracts are subject to the police power, and corporate charters are given as an instance. On page 734, the author classes the regulation of railroad rates as an exercise of the police power. At another place is found this statement: "Police regulations must have some reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter."

The last statement was forced from the author's pen by such cases as the Missouri one of Sloan v. Pacific R. R.,[10] which holds, where a railway company has the right by its charter to adjust its own rates, that this right cannot be subsequently impaired by the legislature. The result of these statements of Judge Cooley is this, that all contracts are subject to the police power, and yet they are not so subject. By reason of this same confusion, Mr. James Edsall, before the meeting of the American Bar Association, in 1887, was led into the error of concluding that a state could not make a binding contract as to rates.

In discussing the "police power," the American and English Encyclopedia of Law[11] starts out as follows: "It has been found impossible to frame, and it is indeed deemed inadvisable, to attempt to frame any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend, and excluding everything to which it cannot, the courts considering it better to decide as each case arises whether the police power extends thereto." It does not readily appear what is accomplished by waiting until it becomes necessary to apply the principle of "police power," and then to apply this principle without knowing what it is that is being applied.

It may be stated without fear of contradiction that the present prevalent conception of the "police power" has been formed from these and a few other such generalities. It is regarded as some sort of vague and irresponsible power in a government. From time to time, however, there is manifested a dissatisfaction with this indefinite treatment and a realization of the fact that the true limits of the police power are to be found in a more limited compass. Sometimes we find an indefinite statement prefaced by these words: "Police power in its extended meaning is," etc., intimating that there is another and more limited sphere. Sometimes the limited definition is stated. Usually it takes the following form: "The police power is that plenary

[9] Const. Lim. *572.

[10] 61 Mo. 24.

[11] Vol. 22, p. 915.

power which enables the state to prohibit all things hurtful to the health, morals, safety or welfare of society." The term "welfare" is almost universally present. This is unfortunate for, if the word is used to mean health, morals and safety, it is a useless repetition, while, if the word is to have its literal meaning, it would be difficult to imagine a legislative enactment which would not, at least theoretically, be in the interest of public welfare.

There is one definition that requires notice, for it is often quoted in one way or another. It is found in Potter's Dwarris, chapter xiv: "There exists a power by which private property may be taken, used or destroyed for the benefit of others, and this is called the police power, sometimes called the law of overruling necessity. It is clear that before the adoption of the constitution it was well settled at common law that in cases of actual necessity, as that of preventing the spread of fire, the ravages of pestilence, or any other great public calamity, the private property of the individual may be lawfully taken, used, or destroyed for the relief, protection or safety of the many."

While the "law of overruling necessity" and the "police power" may have for foundation the same idea of self-protection, as principles of law they are widely different. The "police power" is wielded by the state alone, while "overruling necessity" is also a weapon in the hands of private individuals. One example, founded on the definition given above, will suffice. A fire starts in a city and it is seen that by the destruction of A's house the ravages of the fire can be stopped. The fire department, the agent of the state, may tear down A's house; so may private individuals, who have not even a personal interest in the suppression of the fire. In neither case can A recover any damages,[12] in the absence of a statute. Stated more accurately, "police power" is a principle of law, while "overruling necessity" is above any law. This same error has been incorporated into their works by Mr. Tiedeman and Mr. Prentice.

It is often stated that the police power is merely the enforcement of the maxim, "*Sic utere tuo ut alienum non laedas.*" As such a statement has no definite meaning, it will not be profitable to discuss it. These various definitions have been placed before the reader in order to demonstrate the necessity for a different treatment of the "police power." Ever since people began to reason about such things, legal theorists have been discussing the proper limits of legislative power. This would seem to be more a question in the science of government than in the domain of law. So far as it is possible to define it, this sovereign power to pass laws has often been defined by speculative minds, and there is no difficulty in finding terms and phrases to express it. There would seem to be no objection, however, to attempting to fit a new word to the thought, so long as there is no interference with words that have legitimate spheres elsewhere. The term "police power" has such a sphere, one to which definite and peculiar legal principles may be assigned.

It must be self evident that there is a vast difference, from the standpoint of the state, between a law passed to prevent the spread of contagious diseases, and a law to encourage home production or to prevent a public service company from earning more than a certain per cent to be paid out in dividends. The writer does not pretend to be suggesting any novelty. The first object of private law is to protect life and liberty. To safe-guard these rights the individual is allowed "self-defense." These rights of the individual cannot be contracted away. From the very nature of things the same general principles apply in the case of the state. Before intellectual or commercial prosperity come the existence and liberty of the state. Certain things are conditions to general prosperity and welfare. The state must be free; it must not be depraved; society must be safe; there must be a government properly located. Legislation which is aimed at accomplishing these objects is one step higher than all other enactments. Different principles should apply to it. A special name should designate it. The writer knows of only one author who pointedly and definitely attempts to so limit the "police power." In one paragraph in his work on the Fourteenth Amendment, Mr. Guthrie suggests that the "police power" should be limited to "health, morals and safety." While this is the form the power usually takes in actual laws, it extends

[12] *In re* Cheeseborough, 78 N. Y. 232, 237. See 4 Denio, 461, 474.

equally well to the preservation of the freedom of the state, and to the location and maintenance of the essential foundation of administrative government. The latter is shown by the fact that the location of the seat of government can be removed in spite of a contract between the state and private individuals.

Many of the principles applying to this special division of legislative action are clearly recognized. Being vital and essential to the very existence of government, these powers are necessarily continuing in their nature and to be wielded as the special exigencies of the moment may require. Their exercise cannot be limited or abridged by any constitutional convention or legislature. The people could not do this themselves, much less their servants. Accordingly it is held that the provision of the federal constitution against the impairment of contract does not apply to the exercise of these powers.[13] The writer is well aware that thecourts usually state that all contracts are made in comtemplation of the subsequent exercise of these powers on the part of the state. This is either a falsehood or a fiction. The constitution l provisions which operate as restrictions upon the states, have no effect upon the exercise of this special and vital division of state legislation, for the simple reason that the states could not make a valid agreement to abridge its exercise. Accordingly it is held that the 14th amendment does not control it.[14] The same is true of a state constitutional provision that property shall not be taken for public use without compensation.[15] A statute passed by the legislature of a state in pursuance of these powers is not subject to review by the Supreme Court of the United States as to its reasonableness.[16] This principle has been denied by some writers and the "Granger Cases" cited in support of the objection. In the later so called "Granger Cases" the supreme court held that they had the right to review the reasonableness of a state statute which fixed a maximum rate for railway companies. The error comes, of course, from a failure to recognize that the true limits of the "police power" do not extend to the "Railway Rate Cases."

One principle, in reference to these vital powers of a state, has been so universally misstated, as to have afforded an apparent weakness in the argument for a limited use of the term "police power." In his dissent in the case of Leisy v. Hardin,[17] Mr. Justice Gray expressed the error in the following words:

"This power being essential to the maintenance of local government and to the safety and welfare of society, is inalienable."

It has, undoubtedly, been settled by the decisions of the past ten years, that the power of a state to protect its health cannot be exercised if it conflicts with an active exercise by congress of the power vested in the latter by virtue of the "commerce clause." Therefore, it is argued, one of the principles applying to this limited sphere of state activity, has already been overthrown. The answer is that there is no such principle as the "inalienability of the police power." So long as a state retains in its own hands the exercise of these essential powers, which we are now discussing, then it cannot abridge or limit thesr exercise in any wise. This is demonstrated by the cases which hold that the restrictive clauses of the federal constitution do not limit the states in the exercise of the "police power." But there is no power which may not be granted from one government to another and superior government. This is demanded by the principles of progress and evolution in governments. If two states confederate and form a single new state, it would be absurd to argue that the people inhabiting the territory embraced in the limits of each of the original states continued to possess the right to legislate on any subject. The same is true where the new central government is merely one of limited powers. There is no principle of constitutional law that could have prevented the states of our Union from alienating all or any part of their power to legislate on these vital

[13] Beer Company v. Massachusetts, 97 U. S. 25, 115 Mass. 153.

[14] Barbier v. Connelly, 113 U. S. 27, 31; Mugler v. Kansas, 123 U. S. 623; Powell v. Pennsylvania, 127 U. S. 678.

[15] Sedgwick, Const. of State and Const. Law, p. 435 (Pomeroy's Ed.).

[16] State v. Layton, 160 Mo. 474: Sanders v. Commonwealth (Ky.), 77 S. W. Rep. 358.

[17] 135 U. S. 100.

subjects, to the federal government. The only question is, did they so alienate it, and to what extent? This is the tendency of recent decisions. The theory of "inalienability was suggested early in the history of the "commerce clause." This idea naturally received the full weight of Marshall's condemnation, vigorous federalist as he was. The theory did not receive support from the supreme bench until the days of Mr. Justice McLean. It was first enforced in the "license cases."[18] However often the theory may be stated at the present day, recent decisions have settled, that congress, so far as interstate commerce is concerned, has absolute power over this vital legislation of the states. If congress does not declare its will, then the state may act in matters which are local, and which require local treatment. If the dissenting justices in Leisy v. Hardin, had recognized that these vital powers of a state, like every other power, must be alienable, they would not have found it so impossible to reconcile the decision of the majority in that case with such cases as Beer Co. v. Massachusetts.

After these rambling pages, a few words by way of a brief summary may be permitted. Undoubtedly the almost universal conception of the "police power," at the present day, is along the extended lines laid down by such definitions as those of Cooley and Shaw. Unless this conception be changed, there is, indeed, no definite principle of law that can be applied to the "police power," and one is led to say of it what De Toqueville said of the British Constitution: "*Elle n'existe point.*" It seems a pity to lose the term "police power" as a legal phrase, almost as much as it would be, to lose the term "self-defense." There is a limited sphere of legislative action to which definite and distinct principles apply and this sphere historically has earned the title of "police power." It is the power to protect the freedom, the safety, the health and morals of society; and to locate and maintain the essential foundation of administrative government. It is not impossible to "mark its boundaries or prescribe limits to its exercise." The only difficulty may be to ascertain in a given case, whether the facts fall within these limits.

The history of the "police power" in its early days and the history of the term "trust" inrecent years, have many points in common. The term "trust" has not yet been accepted and adopted by the courts in its extended popular meaning. On the other hand the courts seem indeed to have "legally adopted" the popular conception of "police power," that precocious child born in the abolition days. The writer desires to record a very feeble protest.

J. M. BLAYNEY, JR.

St. Louis.

[18] 5 How. 504.

MARRIED WOMEN—RECOVERY OF PAYMENTS ON DISAFFIRMANCE OF CONTRACTS.

EDWARDS v. STACEY.

Supreme Court of Tennessee, October 20, 1904.

Where a married woman contracted in writing to purchase certain real estate, and, after paying a portion of the price, disaffirmed the contract, she was not entitled to recover the money so paid, though the contract was executory, in that no conveyance had been executed.

SHIELDS, J.: Mrs. Edwards, a married woman, contracted with the defendant, Stacey, as agent for Mrs. Bickford, to purchase a house and lot in Memphis, Tenn., for $5,000. The contract was reduced to writing and signed by the parties. Mrs. Edwards paid the defendant $250 cash, and agreed to make notes for the remainder of the purchase money upon delivery of a conveyance of the property. Afterwards, before tender of the conveyance, she repudiated the contract, and brought this suit to recover the cash payment made.

There is some controversy whether the $250 was a part payment of the purchase money or a sum to be forfeited in the event of complainant's failure to complete her contract of purchase, but we are of the opinion that it was a payment upon the purchase price agreed to be paid for the house and lot, and must be so treated.

Complainant does not controvert that a married woman electing to rely upon her disability to avoid the performance of a contract to purchase land which has been conveyed to her cannot recover partial payments which she has made, and this seems to be well settled law. Jackson v. Rutledge, 3 Lea, 626, 31 Am. Rep. 655.

Her contention is that, no conveyance of the property purchased having been made, the contract is executory, and she may repudiate it entirely, and recover the cash payment made by her.

We are unable to see any distinction in the rights of a married woman, where a conveyance of title is made, and where a valid contract to make such conveyance is executed by the vendor. Both instruments are made by the vendor, who is

competent to contract; one an executed, and the other an executory, contract, and equally binding upon him. The contract of the vendee in both cases is to pay money, and her right to repudiate it is the same whether a conveyance be made or only contracted to be done. What she does in both cases is to make part payment of the purchase price agreed upon—to part with her money. The delivery of a conveyance does not obligate her any more than a valid contract to convey. The two contracts differ only in their effect upon the vendor and the property.

The disability of coverture was never intended to enable married women to do injustice or wrong. It is a weapon of defense, not of offense. It is a protection against all attempts to compel them to complete their contracts, if they consider it to their interest to decline to proceed further with them; but it does not give them the right to recover money paid under an agreement fairly made. The money of a married woman is her absolute property, aside from the rights of her husband, and she has the right to part with it in any manner she may desire, and when she does so, in the absence of fraud, her action is irrevocable.

These are the reasons given in the cases where conveyances were made in the execution of contracts of sales of real estate to married women for refusing recoveries of part payments of purchase money, and we can see no reason why they do not apply with equal force to cases of this character.

This is said to be the rule in the case of Johnson v. Jones, 51 Miss. 860, in an able opinion by Campbell, J., and, although this exact point was not directly there involved, it is fully considered by that distinguished judge, and clearly shown that there is no reason for a distinction in cases where a conveyance is made and those where the contract is to make one at some future time.

We are of the opinion that there is no error in the decree of the chancellor, and it is affirmed with costs.

Affirmed.

NOTE.—*Avoidance of Contracts by Married Women.*

A contract by a married woman is not absolutely void but voidable by her at her option. North v. Firth (Pa.), 2 Del. Co. Rep. 467; Godfrey v. Wilson, 70 Ind. 50. And since the contract of a married woman is not binding on her, the court cannot inquire into her motives for rescinding it. Peters v. Shaner (Pa.), 1 Del. Co. Rep. 252. And further, since a married woman cannot acquire capacity to contract by falsely representing that she has such capacity, she is not estopped by her declarations, made at the time of contract, that she was the possessor of a separate estate, for the benefit of which she was contracting. Baker v. Lamb, 11 Hun (N. Y.), 519; Kilbourn v. Brown, 56 Conn. 149, 14 Atl. Rep. 784; Plumer v. Lord, 87 Mass. (5 Allen) 460; Keen v. Coleman, 39 Pa. (3 Wright) 299; Tribble v. Poore, 30 S. Car. 97; Wilks v. Fitzpatriek, 20 Tenn. 54. So, also, where a married woman sues to rescind a contract made by her, on the ground of coverture, she is not bound to prove that she was not authorized, but it is a negative proposition, the burden of which is on the other party. Drangnet v. Prudhomme, 3 La. 74. Where, however, a married woman represents to plaintiffs that she has taken a logging job, and buys corn of them to use in the business, she cannot in an action under R. L. § 2321, providing that a married woman carrying on business in her own name may be sued as if unmarried, claim that her representations were false, and the business belonged to her husband. Smith v. Weeks, 65 Vt. 566, 27 Atl. Rep. 197.

Though a married woman cannot bind herself by a contract to purchase goods or property, she cannot recover money paid by her in part performance of such a contract. Pitts v. Elsor, 87 Tex. 347, 28 S. W. Rep. 518; Johnson v. Jones, 51 Miss. 860; Appeal of Gauff, 3 Walk. (Pa.) 152. But in Byber v. Smith (Ky. 1889), 11 S. W. Rep. 722, it was held that in an action to enforce a vendor's lien against land sold to a married woman, where the land has not been conveyed to defendant, she may plead her coverture at the time of making the contract, for the purpose of resisting its execution and of having it rescinded, and of recovering back the purchase money already paid, with a lien on the land to secure the latter, and need not offer in her plea to return the land to the vendor.

If an infant who is also a married woman makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance until a reasonable time after the coverture ends. Sims v. Smith, 86 Ind. 577.

JETSAM AND FLOTSAM.

DISCHARGE OF SURETIES ON BUILDING CONTRACTS.

In Shelton v. American Surety Co. of New York, in the United States Circuit Court of Appeals, Third Circuit, June, 1904, 131 Fed. Rep. 210, it was held that where a building contract provides that no payments shall become due until in each case the contractors shall have delivered to the owner a satisfactory release of liens against the premises, and the owner makes payments without requiring vouchers or releases, such payments constitute a substantial departure from the contract, to the prejudice of the contractor's surety, and discharge it from liability for a loss resulting therefrom.

It expressly appeared that "it is for a loss which resulted from the owner making payments without requiring the protection of a release of liens that the plaintiff sought to hold the contractors' surety liable." It, therefore, would seem that this case was rightly decided according to substantial principle and the weig ht of authority. Nevertheless, one of the members of the court did not join in the decision and the discussion in the dissenting opinion is significant of the judicial attitude towards attempts of surety companies to evade their contracts and escape just liability upon flimsy and technical grounds. The law on the subject seems to be that while express changes in the contract itself, without the surety's consent, will release it, a mere variation in the manner of performance will not discharge the surety unless it can show that it has been actually prejudiced thereby, and then only to the extent of the resulting injury. In Smith v. Molleson, 148 N. Y. 246, the court used the following language: "When the terms of the contract guaranteed have been changed or the contract, as finally made, is not the one upon which the

surety agreed to become bound, he will be released. Page v. Krekey, 137 N. Y. 307.

But in this case there is no claim that the terms of the building contract, to which the defendant's bond related, have in any respect been changed by the parties to it. The most that is claimed is that, in its performance, the parties have so far departed from its terms as to change the defendant's condition to her prejudice, and to deprive her of rights and benefits under the contract, which otherwise she would be entitled to by subrogation. Where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is no longer bound. * * * We are not dealing now with any actual change in the terms of the contract, but with acts or omissions of the plaintiff in the performance, which, in order to operate to release the surety, must be of such a character that it can be said that her position was changed to her prejudice."

In Kohler v. Matlage, 72 N. Y. 259, the court said: "The counsel for the defendants presented various questions by requests to find, and otherwise, based upon the conduct of the plaintiff in respect to the chattel mortgage before referred to, and the counsel in some of his points seems to suppose that if the plaintiff by any act or consent had impaired this security, or changed its terms, the sureties would be entirely discharged from their obligation. This is a misapprehension. Any change in the terms of the contract of the principal, for which the sureties are bound, without their consent, would discharge them. The contract is contained in the bond signed by the sureties, and there is no pretense that any of the terms of that instrument were changed, or in any manner affected. The chattel mortgage was held by plaintiff as collateral security, and if the defendants had paid the debts they would have been entitled to subrogation after the individual interest of the plaintiff had been satisfied. If the plaintiff, by any act of bad faith, had impaired this security to the injury of the defendants, they might avail themselves of it to the extent of the injury proved (Story's Eq. sec. 501; Schroeppell v. Shaw, 3 Comst. 457), but it would not release them beyond that."

See also Henricus v. Englert, 43 N. Y. St. Rep. 596.

The law is well settled in this state that the defense that a surety has been discharged by changes in the contract or variation in the method of performance, constitutes new matter and must be pleaded in order to be available for the surety's protection. Nat. Radiator Co. v. Hill, 79 App. Div. 109; Sachs v. Am. Surety Co., 72 App. Div. 60, 66; Henricus v. Englert, 137 N. Y. 488, 495.—*New York Law Journal.*

HUMOR OF THE LAW.

"Do you know, a justice court marriage doesn't seem like a marriage at all," confided a sweet bride, who had tried the experiment, to her friend.

"No, why not?" asked the friend.

"Well, you see, it's a good deal like a law suit. You have the feeling all the time that you can appeal to a higher court whenever you become dissatisfied with the verdict."

The late Tim Campbell of "What's the Constitution between friends" fame, was once a civil justice in New York, and had a bill passed by the legislature giving the justices salaries of $10,000 a year.

"Why, Tim," said the governor when the bill came to him for consideration, "that is more than the judges of the supreme court in Washington receive."

"Oh, well," said Tim, "if you want first-class talent you must pay first-class prices."

Giles Jackson, the celebrated negro lawyer of Richmond, in defending one of his clients in the police court, began to read from the code. The police justice seemed to suspect that Mr. Jackson was reading something which was not there, and interrupted the lawyer, saying, "Mr. Jackson, I never heard of any such law as that." "Well," said the lawyer, "is you 'gwine to hold my client responsible for the ignorance of this court?"

An important criminal case was being tried in a western territory and great care had been exercised to get an impartial jury with no preconceived opinions. Every prospective juror had been carefully asked if he had formed any opinion or had any bias in the matter and all on the panel had responded in the negative.

The case had proceeded to trial and the state had made a strong case, when one of the jurors arose and asked to be excused from the further hearing of the case. The court asked his reason and the conscientious juror responded:

"Well, judge, you see I swore, under oath, a while ago, I didn't have any prejudice in this case, and that was so then, but from what I've heard since then I believe I've got such a prejudice I can't render a fair and impartial verdict."

The juror was retained.

The statutes of the state of Washington give as grounds for vacating judgments, among others, fraud and misfortune. In a recent suit the defendant petitioned to have a judgment vacated on the ground that the attorney for the plaintiff had accepted a part payment in full satisfaction of plaintiff's demand, and had told defendant he need not appear at the trial. All of which defendant said he believed. Subsequently, the defendant claims, a default judgment was entered against him for the full amount claimed by plaintiff. The petition then alleges, as another ground for vacation, "That defendants were prevented by reason of misfortune in defending said action, in this, that had defendants had knowledge of the law and the way it is sometimes practiced, they would not have believed and put trust in said attorney."

The following anecdote is told of Chief Justice Waite;

During the late seventies, an old man of rustic simplicity stepped into the supreme court room at Washington, and seated himself on one of the benches set apart for visitors. He listened attentively for a short time to the arguments of counsel in a case then before the court. Presently, edging over to the attendant at the door, he whispered:

"What is the chief justice's name?"

"Waite," answered the doorkeeper.

The old gentleman nodded his head, and with a puzzled expression said, "All right," and resumed his seat. After a short while he returned to the attendant and again whispered:

"Now do you mind tellin' me who the chief justice is?"

"Waite, I told you," rejoined the doorkeeper, thi time with a surly snarl.

This proved too much for the visitor. In a hoarse whisper, audible throughout the entire court room, he said:

"See here, now, young man, you've tol' me to wait twice, but I've ben a watchin' you, and you h'aint ben a doin' a blamed thing. I'll see whether I've got to wait your convenience."

With that outburst the old man trudged angrily out, leaving the doorkeeper in a fit of laughter that threatened the loss of his position.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADJOINING LANDOWNERS — Lateral Support. — An owner of land is entitled to restrain an adjoining landowner from making exeavations in his land tending to deprive complainant's land of lateral support in its natural state.—Gillies v. Eckerson, 89 N. Y. Supp. 609.

2. ADJOINING LANDOWNERS — Nuisance. — Plaintiff, having set out a line hedge, held not entitled to compel defendant, an adjoining property owner, to dig out and destroy the same on its becoming a nuisance.—Harndon v. Stultz, Iowa, 100 N. W. Rep. 329.

3. ABATEMENT AND REVIVAL—Successive Attachments —Where the state statute provides for successive attachments of the same property, a prior attachment in a state court affords no ground for the discharge of an at tachment in a federal court.—D. E. Loewe & Co. v. Law lor, U. S. C. C., D. Conn., 130 Fed. Rep. 633.

4. ACCORD AND SATISFACTION—Performance.— Accord held sufficiently executed when all is done which party agrees to accept in satisfaction of his claim.—Langhead v. H. C. Frick Coke Co., Pa., 58 Atl. Rep. 685.

5. ACCOUNT, ACTION ON—Admissibility of Books of Account.—Books of account showing absence of credits held admissible in rebuttal of evidence of payment.—H. L. Handy & Co. v. Smith, Conn., 58 Atl. Rep. 694.

6. ACTION—Creditors' Rights as to Equitable Assets.— A suit by general creditors to obtain a judgment against their debtor, and to have certain equitable assets belonging to him applied to the satisfaction of the judgment obtained, stands on the same footing as a judgment creditors' bill in equity.—Bronson v. Thompson, Conn., 58 Atl. Rep. 692.

7. ACTION—Defective Streets.—A cause of action is some particular right of the plaintiff against the defendant, together with some definite violation of such right.—City of Columbus v. Anglin, Ga., 48 S. E. Rep. 318

8. ANIMALS—Right to Impound.—Defendant held entitled to impound an animal belonging to plaintiff, which escaped through a line fence by reason of plaintiff's failure to keep the same in repair.—Walker v. Robertson, Mo., 81 S. W. Rep. 1183.

9. APPEAL AND ERROR—Constitutionality of Act not Passed on Below.—The supreme court will not pass on the constitutionality of an act unless the question was presented in the court below and passed upon by the trial judge.—State v. Henderson, Ga., 48 S. E. Rep. 334.

10. APPEAL AND ERROR—Harmless Error.—A new trial will not be ordered because the trial judge, in instructing the jury in an action by an administrator, used the word "plaintiff" where he evidently meant "plaintiff's intestate."—Blackshear v. Dekle, Ga , 48 S. E. Rep. 311.

11. APPEAL AND ERROR—Law of the Case.—In an action for injuries to a servant, an instruction given by the court on assumed risk, not excepted to, held to constitute the law of the case on appeal on such issue.—Austin v. Fisher Tanning Co., 89 N. Y. Supp. 137.

12. APPEAL AND ERROR—Record on Appeal.—Rulings on demurrer cannot be reviewed, where the record does not contain the pleading embracing the demurrer, nor any judgment or order disposing of the same.—United States Fidelity & Guaranty Co. v. Fossati, Tex., 81 S. W. Rep. 1038.

13. APPEAL AND ERROR — Right to Complain of Requested Charge.—A party cannot complain of the court's compliance with his own request for a charge.—Stern v. Leopold Simons & Co., Conn., 58 Atl. Rep. 696.

14. APPEAL AND ERROR—Special Plea.—Sustaining a demurrer to a special plea held harmless; the matter pleaded in reduction of damages being provable under the general issue.—Karter v. Fields, Ala., 37 So. Rep. 204.

15. APPEARANCE — Waiver of Service. — Where a defendant who has not been properly served with summons moves to vacate a default judgment on jurisdictional grounds, and asks to file an answer, jurisdiction over her person is complete from the date of such appearance.—Simensen v. Simensen, N. Dak., 100 N. W. Rep. 708.

16. ARREST—Arrest Without Warrant. — Defendant held properly arrested by a night watchman at the direction of the city marshal without a warrant, while cursing and swearing loudly within the hearing of women after he had several times been warned to desist.—People v. Nihell, Cal., 77 Pac. Rep. 916.

17. ASSAULT AND BATTERY—Assault on Officer.—In a prosecution for an assault on an officer who had arrested defendant for breach of the peace it was immaterial tha defendant was never prosecuted for the lesser offense. —People v. Nihell, Cal., 77 Pac. Rep. 916.

18. ATTORNEY AND CLIENT—Claims on Trust Fund for Fees.—Under the facts, held that there could be no first claim on a trust fund for services of an attorney for the benefit of individual beneficiaries.— Sloan v. Smith, Conn., 58 Atl. Rep. 712.

19. BANKRUPTCY—Adverse Claim to Property.—A claim against a bankrupt for work done under a contract after the filing of the petition cannot be proved as a debt against the estate, although the contract was entered into prior to the filing of the petition, but was at that time wholly executory.—*In re* Adams, U. S. D. C., D. R. I., 130 Fed. Rep. 788.

20. BANKRUPTCY—Claims not Disclosed.—A bankrupt, for whom no trustee had been appointed and who had been discharged, held not entitled to maintain suit for his own benefit on a claim not disclosed in his schedules.—Rand v. Iowa Cent. Ry. Co., 89 N. Y. Supp. 212.

21. BANKRUPTCY—Concealment of Property.—To establish fraudulent concealment of property by a bankrupt, which will defeat the right to a discharge, it must appear that such property in fact belongs to the bankrupt's estate, and it is not sufficient that it may have been originally transferred in fraud of creditors, where such transfer was more than two years prior to the bankruptcy.—*In re* Dauchy, U. S. C. C. of App., Second Circuit, 130 Fed. Rep. 532.

22. BANKRUPTCY—Exemptions.—The claim of exemption made by an involuntary bankrupt in his schedules, as provided by Bankr. Act, ch. 541, § 7a, cl. 8, must be regarded as effective and in time; and, where his property has previously been sold by a receiver, he may claim his exemption out of the proceeds, regardless of the time and manner of selection required by the state law.—*In re* Stein, U. S. D. C., E. D. Pa., 130 Fed. Rep. 629.

23. BANKRUPTCY—Fees of Referee.—Under Bankr. Act ch. 541, the only allowance which can be made to a referee, in addition to the fees and commissionexpressly prescribed therein, is for expenses necessarily incurred a detailed account of which must be kept and returned to the court, verified by the oath of the referee, and accompanied by vouchers when they can be procured.—*In re* Daniels, U. S D. C., N. D. Iowa, 130 Fed. Rep. 597.

24. BANKRUPTCY—Hearing on Application for Discharge.—On the hearing on a petition for discharge and the specifications of objection thereto, the testimony of the bankrupt, given at the first meeting of creditors, is admissible; but the testimony of other witnesses taken at such time is not.—*In re* Goodhile, U. S. D. C., N. D. Iowa, 130 Fed. Rep. 782.

25. BANKRUPTCY — Leasehold. — A trustee in bankruptcy has the option either to abandon or accept a leasehold held by the bankrupt.—Summerville v. Kelliher, Cal., 77 Pac. Rep. 889.

26. BANKRUPTCY—Opposition to Discharge.—A specification of objection to the discharge of a bankrupt on the ground that he fraudulently failed to keep books of account is sufficient if made in the language of the act; but specifications on the ground of his transfer or concealment of property, or the making of a false oath, must set out the facts relied on.—*In re* Ginsburg, U. S. D. C., E. D. Pa , 130 Fed. Rep. 627.

27. BANKRUPTCY—Preferences.—The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account subject to check, does not constitute a preferential transfer of property, under Bankr. Act, ch. 541, § 60a, although the bank is a creditor and it has the right, on the bankruptcy occurring, to set off its own claim against the balance in the account. —*In re* Scherzer, U. S. D. C., N. D. Iowa, 130 Fed. Rep. 631.

28. BANKRUPTCY — Present Consideration. — Under Bankr. Act, ch. 541, § 67d, mortgage lien acquired within four months of bankruptcy of mortgagor held not affected by the bankruptcy.—Phillips v. Kahn, 89 N. Y. Supp. 250.

29. BANKRUPTCY—Reclaiming Misappropriated Trust Funds.—Misappropriated trust funds in the hands of a trustee in bankruptcy should be followed and reclaimed, by appearing before the referee and making claim to them before they have been distributed to other parties.—*In re* Wilkesbarre Furniture Mfg. Co., U. S. D. C , M. D. Pa., 130 Fed. Rep. 796.

30. BANKRUPTCY — What Law Governs Deposits in Bank.—The character of a bank deposit in New York held determinable according to the laws of that state.—Schinotti v. Whitney, U. S. C. C., E. D. La., 130 Fed. Rep. 780.

31. BANKS AND BANKING—Application of Deposit to Indebtedness.—A bank, which has a claim against a depositor, has the right, on his insolvency, to apply the amount of the deposit to the indebtedness, whether due or not.—Owen v. American Nat. Bank, Tex., 81 S. W. Rep. 988.

32. BENEFIT SOCIETIES—Suicide.—A mutual benefit association held not entitled, as against existing members, to pass an amendment to its by-laws striking out all time limit in a provision relative to payment in case of suicide.—Fargo v. Supreme Tent of Knights of Maccabees of the World, 89 N. Y. Supp. 65.

33. BILLS AND NOTES—Pleading.—In an action between indorsers on a note, an answer alleging a diversion, but failing to state when plaintiff became aware of the diversion, held bad.—Corn v. Levy, 89 N. Y. Supp. 658.

34. BRIBERY—Whether Affected by Validity of Measure Sought to be Passed.—It is not necessary, in order to constitute bribery, that the vote of the public official bribed should be on a measure that is valid and can be enforced.—State v. Lehman, Mo., 81 S. W. Rep. 1118.

35. BROKERS—Action for Commissions.—In an action by a real estate agent for commissions, questions as to whether witness had not said at various times that plaintiff had the land in his hands as broker were properly excluded because specifying no time or place.—Bradley v. Gorham, Conn., 58 Atl. Rep. 698.

36. BUILDING AND LOAN ASSOCIATIONS—Payment of Loan.—One borrowing of a building and loan association held not estopped to claim his debt was paid by application of premiums, assessment on stock, etc.—Johnson v. Washington Nat. Bldg., Loan & Investment Assn., Oreg., 77 Pac. Rep. 872.

37. CARRIERS — Alighting From Train. — Whether a person is guilty of negligence in alighting from a slowly moving train just as it is leaving the depot is a question for the jury.—Newcomb v. New York Cent. & H. R. R. Co , Mo., 81 S. W. Rep. 1069.

38. CARRIERS—Injury to Attendant of Live Stock. — Where a passenger is being transported by an express company on a special train, made up expressly for it, and is injured through the negligence of the railroad, he may sue either the express company or the railroad, or both.—American Exp. Co. v. Ogles, Tex., 81 S. W. Rep. 1023.

39. CARRIERS—Injury to Cattle.—Lack of actual notice to carrier that cattle were placed in its pens awaiting transportation held not to relieve it from liability for injury thereto while in the pens.—Ft. Worth & D. C. Ry. Co. v. Waggoner Nat. Bank. Tex , 81 S. W. Rep. 1050.

40. CARRIERS—Contract for Grain Shipment —Transit of grain held one under a single contract of shipment notwithstanding a right reserved in the bill of lading to change the destination at an intermediate point, and a consequent change of destination. — Soper v. Tyler, Conn., 58 Atl. Rep. 699.

41. CARRIERS—Injury to Cattle In Transit. — In an action for injuries to cattle during transportation, the carrier held estopped to claim that its liability was limited to injuries occurring on its own line under the contract of shipment. — Chicago, R. I. & T. Ry. Co. v. Carroll, Tex., 81 S. W. Rep. 1020.

42. CARRIERS—Injury to Person in Passenger Elevator.—Where a passenger was injured in an elevator, evidence held sufficient to show negligence in the maintenence of the elevator, and to justify the finding of a casual connection between the negligence and the injury. —Goldsmith v. Holland Bldg. Co., Mo., 81 S. W. Rep. 1112.

43. CARRIERS—Instruction in Personal Injury Case.—In an action by a passenger for injuries sustained in a railway collision, an instruction held not erroneous because based on the theory that plaintiff was injured in a collision.—Magrane v. St. Louis & S. Ry., Mo., 81 S. W. Rep. 1158.

44. CHARITIES—Liability of Hospital for Negligence of Surgeon.—A public charitable hospital held not liable for negligence of a surgeon in operating on a patient who had paid only for board and attendance, without proof of want of reasonble care in the selection of the surgeon.—Wilson v. Brooklyn Homeopathic Hospital, 89 N. Y. Supp. 619.

45. CHATTEL MORTGAGES—Loss of Lien.—Where a mortgage of crops gave the mortgegee the power to take possession and store the crops, his act in so doing where he did not claim to hold otherwise than as mortgagee, was not tortious, and did not extinguish his lien.—Summerville v. Kelliher, Cal., 77 Pac. Rep. 889.

46. CARRIERS—Negligence A Jury Question.—In an action against a street railroad for injuries to a passenger, negligence of defendant and contributory negligence of passenger held to be questions for the jury.—Allen v. St. Louis Transit Co., Mo., 81 S. W. Rep. 1142.

47. COMMERCE—Tagging Carcasses of Veal.—Laws 1902, p. 58, ch. 30, §§ 70e, 70a, requiring carcasses of calves shipped in the state to be tagged, held not violative of the interstate commerce provisions of the federal constitution.—People v. Bishopp, 89 N. Y. Supp. 709.

48. CONSTITUTIONAL LAW—Act Requiring Railroads to Redeem Tickets.—Batts' Ann. St. art. 4560a, 4560b, requiring railroads to redeem tickets, and providing a penalty for their refusal to do so, held not unconstitutional, as depriving such railroads of the equal protection of the laws.—Texas & P. Ry. Co. v. Mahaffy, Tex., 81 S. W. Rep. 1047.

49. CONSTITUTIONAL LAW—Constitutional Amendment, When Effective.—The date of the taking effect of a constitutional amendment cannot be established by admission or agreement of counsel.—City Counsel of City and County of Denver v. Board of Com'rs of Adams County, Colo., 77 Pac. Rep. 858.

50. CONSTITUTIONAL LAW—Depositions.—Code Civ. Proc. § 1991, authorizing the court to strike out the answer of a party for refusal to attend when required and give his deposition, is unconstitutional.—Summerville v. Kelliher, Cal., 77 Pac. Rep. 889.

51. CONSTITUTIONAL LAW—Entry of Land for Taxation.—Const. W. Va. art. 13, § 6, attempting to forfeit tract containing 1,000 acres or more for failure to comply with the law in regard to taxation, is an unreasonable discrimination and repugnant to the fourteenth amendment of the Constitution of the United States.—King v. Hatfield, U. S. D. C., D. W. Va., 130 Fed. Rep. 564.

52. CONSTITUTIONAL LAW—Limiting Charges of Employment Agencies.—St. 1903, p. 14, ch. 11, § 4, arbitrarily limiting the compensation of an employment agent, held not within the police power.—*Ex parte* Dickey, Cal., 77 Pac. Rep. 924.

53. CONSTITUTIONAL LAW—Regulation of Business.—Laws 1897, p. 498, ch. 415, §§ 180, 184, regulating the business of horse-shoeing, held unconstitutional, as a deprivation of liberty and property without due process of law.—People v. Beattie, 89 N. Y. Supp. 193.

54. CONSTITUTIONAL LAW—Special Taxation.—A special assessment tax, according to frontage and not benefits, is not a denial of equal protection or due process of law.—Ross v. Kendall, Mo., 81 S. W. Rep. 1107.

55. CONSTITUTIONAL LAW—Taxation.—Laws 1903, p. 213, ch. 161, providing for the enforcement of taxes on realty sold to the state or county, and unredeemed, held not a violation of the constitution, as a delegation of legislative power to the county boards, as the discretion permitted is administrative only.—Picton v. Cass County, N. Dak., 100 N. W. Rep. 711.

56. CONTRACTS—Construction of Agreement as to Fisheries.—A covenant by sellers of fisheries and their good will not to fish or manufacture the product of certain fish along the Atlantic seaboard for a term of 20 years construed, and held to preclude them from establishing a fishing plant on Chesapeake Bay.—Fisheries Co. v. Lennen, U. S. C. C. of App., Second Circuit, 130 Fed. Rep. 533.

57. CONTRACTS—Effect of Disaffirmance.—Disaffirmance of a contract merely voidable held not to affect right to money previously earned pursuant to its terms.—People v. Republic Savings & Loan Assn., 89 N. Y. Supp. 582.

58. CONTRACTS—Liquidated Damages.—Use of a room in a courthouse by a clerk and court before acceptance by the county held not a waiver of claim for liquidated damages under the contract for its erection.—Lawrence County v. Stewart Bros., Ark., 81 S. W. Rep. 1059.

59. CONTRACTS—Public Policy.—A contract whereby a banking institution agreed to sell plaintiff's stock within a year for a certain sum and pay such sum to plaintiff is not void as against public policy.—Gause v. Commonwealth Trust Co., 89 N. Y. Supp. 723.

60. COPYRIGHTS—Use of Citations from Law Book.—A copyright of a law encyclopedia is not infringed by a subsequent work of like character, because the author of the second work, in its preparation, used lists of cases bearing on different subjects copied from the copyrighted work, and after examining the authorities cited used such citations as he considered applicable in support of his original text.—Edward Thompson Co. v. American Law Book Co., U. S. C. C., S. D. N. Y., 130 Fed. Rep. 639.

61. CORPORATIONS—Amendment of Charter.—The alteration or amendment of the charter of a corporation by the legislature, within power reserved by the grant, does not require submission to the stockholders for their acceptance.—McKee v. Chautauqua Assembly, U. S. C. C. of App., Second Circuit, 130 Fed. Rep. 586.

62. CORPORATIONS—Right to Prohibit Dogs on Street Cars.—A rule of an electric railway company forbidding carriage of dogs on cars is a reasonable one, within the power of the company to make and enforce.—O'Gorman v. New York & Q. C. Ry. Co., 89 N. Y. Supp. 589.

63. CORPORATIONS—Stocks, Title Acquired.—Where one has acquired corporate stock by a transaction which could be rescinded by the other party for fraud his title is good so far as concerns a purchaser from him of such stock.—Gause v. Commonwealth Trust Co., 89 N. Y. Supp. 723.

64. COURTS—Delegation of Judicial Power.—A department decision in which a rehearing was granted is not authority where, before any hearing or further decision was rendered in bank, the proceeding was dismissed on motion.—*Ex parte* Whitley, Cal., 77 Pac. Rep. 879.

65. COURTS—Verdict.—Where all the jury concurred in a verdict, the constitutionality of the law authorizing nine jurors to render a verdict was not involved.—Portwright v. St. Louis Transit Co., Mo., 81 S. W. Rep. 1091.

66. CRIMINAL EVIDENCE—Credibility of Witness.—The credibility of a witness is for the jury, and it is not error to instruct that a witness may be believed though impeached for general bad character.—Ector v. State, Ga., 48 S. E. Rep. 315.

67. CRIMINAL EVIDENCE—Remoteness.—Remoteness, as applied to evidence, depends upon all the considerations, including time, character of the evidence, and all the surrounding circumstances.—State v. Kelly, Conn., 58 Atl. Rep. 705.

68. CRIMINAL LAW—Cautionary Instructions.—Where defendant claimed that he was unconscious of his act as a defense for assault with a deadly weapon, cautionary instructions as to insanity held not reversible error.—People v. Nihell, Cal., 77 Pac. Rep. 916.

69. CRIMINAL LAW—Plea of Guilty.—A plea of guilty in a prosecution before a justice can properly be put in only when the offense charged is one within his final

jurisdiction —McVeigh v. Ripley, Conn., 58 Atl. Rep. 701.

70. CRIMINAL LAW — Sequestration of Witnesses.—Where the rule for sequestration of witnesses on a criminal trial has been invoked, the fact that a witness has heard the testimony of other witnesses does not render his testimony incompetent.—Davis v. State, Ga., 48 S. E. Rep. 805.

71. CRIMINAL TRIAL—Declarations of Co-conspirators.—The acts and declarations of a co-conspirator cannot be considered for the purpose of proving the conspiracy itself.—Smith v. State, Tex., 81 S. W. Rep. 986.

72. CRIMINAL TRIAL—Declaration a Part of the Res Gestæ.—A statement by defendant, within a few minutes after his commission of a homicide, that he was not sorry he shot "the damn son of a bitch," held admissible as *res gestæ*.—Johnson v. State, Tex., 81 S. W. Rep. 945.

73. DAMAGES—Salary Received During Disability.—In determining damages caused to an injured person, defendant is not entitled to credit any salary received by plaintiff while incapacitated from work.—International & G. N. R. Co. v. Haddox, Tex., 81 S. W. Rep. 1030.

74. DEATH—Mortality Tables.—In an action for death by wrongful act, testimony from a mortality table is admissible to show deceased's expectancy in life.—International & G. N. R. Co. v. McVey, Tex., 81 S. W. Rep. 991.

75. DIVORCE — Collusion. — The term "collusion," as used in matrimonial actions, is an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant.—Doeme v. Doeme, 89 N. Y. Supp. 215

76. DOWER — Partition. — A dowress has no interest in growing timber severable from her life estate, and hence a reservation of saw timber in a deed of her dower interest reserves nothing to her as against the reversioner.—Garnett Smelting & Development Co. v. Watts, Ala., 37 So. Rep. 201.

77. EMINENT DOMAIN—Retaining Compensation in Condemnation Proceedings.—The court held to have power to retain a part of the compensation in condemnation proceedings to satisfy a special tax bill issued against the property before condemnation. — Ross v. Kendall, Mo., 81 S. W. Rep. 1107.

78. EMINENT DOMAIN — Telephone Company. — A petition by a telephone company to condemn land in a street for its poles and wires should not be dismissed because it sought to acquire the fee in the land.—New Union Telephone Co. v. Marsh, 89 N Y. Supp. 79.

79. ESTOPPEL—Mortgaged Crop.—A purchaser of a crop held not estopped to show the seller had not such interest in the land three years before the crop was grown as to support a mortgage thereof. — Karter v. Fields, Ala., 37 So. Rep. 204.

80. EVIDENCE—Lost Instruments.—Loss of or inability to find a written instrument must be shown before secondary evidence as to its contents will be received.—Liles v. Liles, Mo., 81 S. W. Rep. 1101.

81. EXCHANGES — Right of Property in Quotations.—That a board of trade conducting an exchange permits gambling therein does not affect its right to invoke the protection of a court of equity for its property right in the market quotations based on the transactions of its exchange.—Board of Trade of City of Chicago v. L. A. Kinsey Co., U. S. C. C. of App., Seventh Circuit, 130 Fed. Rep. 507.

82. EXECUTION — Judgment a Lien on Leasehold. — A judgment is not a lien on a leasehold, and where execution is not levied thereon, the execution purchaser's right takes its inception from the time of sale, or from the giving of notice thereof.—Summerville v. Kelliher, 77 Pac. Rep. 889.

83. EXECUTORS AND ADMINISTRATORS — Duty to Discharge Mortgage.—Where executors are directed to pay mortgages, and are provided with funds so to do, their act in so doing cannot operate otherwise than as a discharge of the mortgages.—Hetzell v. Easterly, 89 N. Y Supp. 154.

84. FALSE IMPRISONMENT—Judicial Officers.—A judicial officer is protected from an action of false imprisonment when the imprisonment was ordered, however erroneously, by a judgment in a proceeding in which the court had jurisdiction.—McVeigh v. Ripley, Conn., 58 Atl. Rep. 701.

85. FEDERAL COURTS—Denial of Jurisdictional Allegations.— A federal court is without jurisdiction of an action at law, where the answer contains a general denial, which under the state practice puts in issue the jurisdictional allegations of the complaint, and there is no proof to sustain such allegations.—Yocum v. Parker, U. S. C. C. of App., Eighth Circuit, 130 Fed. Rep. 770.

86. FIRE INSURANCE—Stipulations.—A stipulation in a fire policy that the insurance company should not be liable for loss caused directly or indirectly by order of any civil authority held not a warranty, as defined by Civ. Code Cal. §§ 2607, 2608.—Connor v. Manchester Assur. Co. of Manchester, England, U. S. C. C. of App., Ninth Circuit, 130 Fed. Rep. 743.

87. FORCIBLE ENTRY AND DETAINER—Lease as Evidence of Extent of Possession.—In an action of forcible entry by a lessee, his lease is admissible, for the purpose of showing the extent of his possession, without regard to the question of its validity.—Clark v. Langenbach, U. S. C. C. of App., Sixth Circuit, 130 Fed. Rep. 755.

88. FRAUDS, STATUTE OF—Debt of Another.—Promise to pay debt of another can only be supported by some new consideration moving to promisor. — Turner v. Lyles, S. Car., 48 S. E. Rep. 301.

89. FRAUDULENT CONVEYANCES—Mechanics' Liens.—Facts held to authorize a finding that a conveyance of property on which a building was being erected was fraudulent, and did not affect the mechanics' liens.—Gilmour v. Colcord, 89 N. Y. Supp. 689.

90. FRAUDULENT CONVEYANCES—Purchase of Trust.—Creditors of *cestui que* trust held, under the circumstances, not entitled to impeach the trustee's title to the trust fund which he had purchased from the *cestui que* trust.—Bronson v. Thompson, Conn., 58 Atl. Rep. 692.

91. GUARDIAN AND WARD—Surrogate's Discretion.—Appointment of the sister of a minor as guardian of his person, and a trust company as guardian of his estate, held a proper exercise of the surrogate's discretion.—*In re* Buckler, 89 N. Y. Supp. 206.

92. HIGHWAYS—Leaving Horses Unhitched in Street.—The owner of a horse held not liable for punitive damages, where his driver left it unhitched in the street and it ran away.—Haywood v. Hamm, Conn., 58 Atl. Rep. 695.

93. HOMESTEAD—Mortgage.—The validity of a mortgage of probate homestead held not affected because order creating it did not enter prior to the date of the mortgage.—Otto v. Long, Cal., 77 Pac. Rep. 885.

94 HOMICIDE—Competency of Evidence.—On prosecution for homicide on circumstantial evidence, it was not competent to prove that deceased had certain enemies and was apprehensive of harm from them.—Wallace v. State, Tex., 81 S. W. Rep. 966.

95. HOMICIDE—Murder of Officer While Dispossessing Tenant.—On a prosecution for murder in the killing of an officer endeavoring to dispossess defendant under a writ of possession, held, that there was no evidence of excessive force on the part of the officer.—Smith v. State, Tex., 81 S. W. Rep. 936.

96. HOMICIDE—Sufficiency of Indictment.—An information charging that defendant feloniously aimed a loaded pistol at another, with the then existing intent to then and there kill the person aimed at, charges the offense described by Rev. Code 1899, § 7115.—State v. Cruikshank, N. Dak., 100 N. W. Rep. 697.

97. INJUNCTION—Police Officer in Suspected Gambling Joint.—Police captain restrained from keeping officers in licensed saloon and dining room on suspicion that

gambling is carried on on the premises.—Hale v. Burns, 89 N. Y. Supp. 711.

98. LANDLORD AND TENANT—Defects in Construction.—A landlord held not liable for injuries to a tenant by reason of a defect in original construction, of which he had no knowledge and which he could not have discovered by ordinary care.—Whiteley v. McLaughlin, Mo., 81 S. W. Rep. 1094.

99. LIBEL AND SLANDER—Question of Privilege, How Raised.—The question of privilege in an action for slander must be raised by plea and submitted to the jury.—Flanders v. Daley, Ga., 48 S. E. Rep 327.

100. LICENSE—Obstruction of Easement.—A purchaser of land with notice that it is burdened with an irrevocable license is liable to the owner of the dominant estate for damages for obstructing the easement.—Brantley v. Perry, Ga., 48 S. E. Rep. 332.

101. LIENS—Chattel Mortgage.—Where a lender of money to a corporation relied on a chattel mortgage as security, he was not entitled to claim or enforce an alleged equitable lien on the corporations' assets.—Gove v. Morton Trust Co., 89 N. Y. Supp. 247.

102. LIFE INSURANCE—Photographic Copy of Application Attached to Policy.—A correct and legible photographic copy of an application for an insurance policy, reduced in size attached to the policy, held a compliance with Act Pa. May 11, 1881, P. L. 20.—Arter v. Northwestern Mut. Life Ins. Co., U. S. C. C. of App., Third Circuit, 130 Fed. Rep. 768.

103. LIMITATION OF ACTIONS—Stockholder's Liability.—The maintenance of a suit against a corporation under Gen. St. Kan. 1889, ch. 23, § 32, held not to suspend limitations as to an action against its stockholders to enforce a statutory liability imposed by section 44.—Whitman v. Atkinson, U. S. C. C. of App., Second Circuit, 130 Fed. Rep. 759.

104. MALICIOUS DESTRUCTION—Injury to Real Property.—Pen. Code 1895, art. 791, making it an offense for any person to willfully or maliciously injure or destroy any real property, applies only to willful or malicious injury to the real property of another.—Adams v. State, Tex., 81 S. W. Rep. 963.

105. MASTER AND SERVANT—Contributory Negligence as a Matter of Defense.—While assumption of risk and contributory negligence are matters of defense, the court cannot ignore plaintiff's own evidence showing conclusively contributory negligence.—Bier v. Hosford, Wash., 77 Pac. Rep. 867.

106. MASTER AND SERVANT—Duty in Furnishing Machinery.—A question as to the subsequent use of a stem and valve claimed, because of their insufficiency, to have caused an accident, held proper cross-examination.—Carr v. American Locomotive Co., R. I., 58 Atl. Rep. 678.

107. MASTER AND SERVANT—Fellow-Servants.—An assistant engineer in a clubhouse, injured by the negligence of a laundry woman operating an electric switch, held a fellow-servant of such laundry woman.—Dooling v. Deutscher Verein, 89 N. Y. Supp. 580.

108. MASTER AND SERVANT—Liability for Acts Outside Scope of Authority.—The master is not bound to make rules as to how his servants shall conduct themselves outside the scope of their employment.—Moran v. Rockland, T. & C. St. Ry., Me., 58 Atl. Rep. 676.

109. MASTER AND SERVANT — Obvious Danger. — The danger of attempting to repair a machine while in operation held so open and apparent that a rule for the government of employees in that particular was not required.—Austin v. Fisher Tanning Co., 89 N. Y. Supp. 187.

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